



Memorandum

Date: JUL 10 1995

From: Jay A. Swope
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BA 562

Subject: Consolidation of "Mature" Indian Self-Determination Contracts

To: Duane L. Jeanotte, Director
Billings Area, IHS

This will respond to your memorandum dated June 27, 1995 requesting our opinion on five specific questions you pose related to the authority to consolidate multiple "mature contracts" under the Indian Self-Determination and Educational Assistance Act, Public L. No. 93-638 as amended (hereinafter "the Act").

The concept of "mature contracts" was added to the basic Act by amendments contained in Public L. No. 100-472, enacted October 5, 1988. Section 4 of the Act was amended to provide a definition of the term "mature contract." Section 4 now defines a "mature contract" as, "a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization . . ." 25 U.S.C. § 450b(h). One of the key attributes of a mature contract is that it may be consolidated with other mature contracts. In other words, multiple mature contracts can be combined into a single contract. The ability to combine multiple mature contracts derives from Section 102(a)(3) of the Act (25 U.S.C. § 450f(a)(3)), which specifically provides that, "Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract."

You have asked five questions regarding the statutory authority to consolidate multiple mature contracts. Our responses to each of your questions are set forth below.

ISSUE: Your first question is whether a Tribal department (such as, for example, a Tribal health department) that operates a program under a self-determination contract can be viewed apart from other Tribal components for purposes of determining whether there are any "significant and material audit exceptions" that would preclude designation of the self-determination contract as a "mature contract" under the Act. In other words, if a Tribe's annual audit contains audit exceptions that relate to programs other than the program being operated under the self-determination contract, would those

audit exceptions prevent the contract from attaining "mature" status?

RESPONSE: Audit exceptions that do not relate directly to the self-determination contract do not prevent the contract from attaining mature status. As noted above, Section 4 of the Act defines a "mature contract" as, "a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization. . . ." (emphasis added). The wording of the statute indicates that the audit exceptions must relate to the self-determination contract if they are to deprive that contract of mature status. The words "for which" refer back to the earlier words "self-determination contract." It is that contract "for which" there must be no significant and material audit exceptions. Audit exceptions which have no direct relationship to that contract are not relevant to the determination of whether the contract is "mature." If there are no significant and material audit exceptions that relate directly to the self-determination contract, and that contract has been operated successfully for the required three years, that contract is, by definition, a "mature contract" under the Act. For example, if a Tribal health department operates a Community Health Representative (CHR) program under a self-determination contract, and the Tribe's annual audit contains audit exceptions relating to the Tribe's gaming operations, those audit exceptions would have no nexus to the CHR program and, therefore, would not operate to deprive the CHR contract of mature status. It should also be noted that designation as a "mature contract" is not discretionary. Section 4 of the Act mandates that, "upon the request of a tribal organization or the tribal organization's Indian tribe . . . a contract of the tribal organization which meets this definition shall be considered to be a mature contract." 25 U.S.C. § 450b(h), emphasis added.

ISSUE: You next ask whether "the consolidation of multiple contracts is restricted to only those contracts which are considered mature."

RESPONSE: We believe that the language of the Act restricts consolidation of self-determination contracts to contracts that are mature. Section 102(a)(3) of the Act specifically provides that, "Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract." 25 U.S.C. § 450f(a)(3), emphasis added. This language clearly limits consolidation to mature contracts. If Congress had intended to authorize the consolidation of all self-determination contracts, the word "mature" would have been omitted from the quoted language. The effect of its inclusion

is to limit the consolidation of multiple contracts to "those contracts" that are "mature" self-determination contracts.

ISSUE: You also ask whether consolidation of multiple mature contracts is mandatory when requested by a tribal organization.

RESPONSE: In our view, whether to permit the consolidation of multiple mature contracts is discretionary. The language employed in the statute is clearly permissive rather than mandatory in nature. Section 102(a)(3) of the Act provides that, "Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract." 25 U.S.C. § 450f(a)(3), emphasis added. Congress did not say, as it could have said, that the contracts "must be consolidated" or that they "shall be consolidated." Rather, Congress chose to use permissive wording, i.e., "may be consolidated." Similar permissive wording is also present in the legislative history. For example, Senate Report No. 100-274, states that:

The Secretary is authorized . . . to allow tribes to consolidate two or more mature contracts into a single contract. . . . The Committee understands that the tribes and the Secretary may want to consolidate funding for purposes of administrative flexibility . . .

Senate Report No. 274, 100th Cong., 1st Sess. 25 (1987), reprinted in 1988 United States Code Cong. and Administrative News, 2620, 2644, emphasis added.

We conclude that whether to permit the consolidation of multiple mature contracts is discretionary rather than mandatory.

ISSUE: You next ask whether the assumption of a new program requires that it be operated three years prior to being considered mature.

RESPONSE: We believe that a new program must be operated successfully for a minimum period of three years before it may be considered to be mature. As noted above, Section 4 of the Act defines a mature contract as one that "has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions" (emphasis added).

ISSUE: You last ask whether, "If a consolidated contract is awarded and the tribe or tribal organization subsequently has major audit exceptions in the OMB Circular A-128 audit, is the availability of using a consolidated contract withdrawn?"

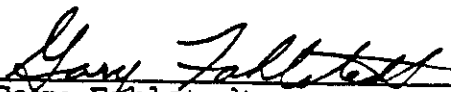
RESPONSE: No. There is nothing in the Act that would require the division of an existing consolidated contract. The Act does not require that previous consolidations be reversed based upon subsequent audit exceptions. Once two or more mature contracts are consolidated into a single contract, that contract is administered in the same manner as any other single mature contract. Audit exceptions do not result in the necessity of subdividing the existing contract.

If you have further questions regarding these matters, please feel free to contact the undersigned at (303) 844-5101, ext. 204.

Sincerely,

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By


Gary Fahlstedt
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cc: ✓ GC:PH
IHS/DLR